

FILED 09/21/10 10:04 AM

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

BRYONNA L. THOMAS,  
Plaintiff,

Civil No. 09-6208-AA  
OPINION AND ORDER

vs.

MICHAEL J. ASTRUE,  
Commissioner of Social Security,  
Defendant.

---

Kathryn Tassinari  
Robert Baron  
Harder, Wells, Baron & Manning, P.C.  
474 Willamette, Suite 200  
Eugene, Oregon 97401  
Attorneys for plaintiff

Dwight Holton  
United States Attorney  
District of Oregon  
Adrian L. Brown  
Assistant United States Attorney  
1000 S.W. Third Avenue  
Portland, Oregon 97204-2902

Franco L. Becia  
Special Assistant U.S. Attorney  
Social Security Administration

1 701 Fifth Avenue, Suite 2900 M/S 901  
2 Seattle, Washington 98104-7075  
3 Attorneys for defendant

4 AIKEN, Chief Judge:

5 Claimant, Bryonna Thomas, brings this action pursuant to  
6 the Social Security Act (the Act), 42 U.S.C. §§ 405(g) and  
7 1383(c)(3), to obtain judicial review of a final decision of the  
8 Commissioner denying her application for Supplemental Security  
9 Income (SSI) disability benefits under Title XVI of the Act. For  
10 the reasons set forth below, the Commissioner's decision is  
11 affirmed and this case is dismissed.

#### 12 PROCEDURAL BACKGROUND

13 Plaintiff protectively applied for Supplemental Security  
14 Income on October 15, 2004, alleging disability as of March 1,  
15 2004. Tr. 65. Plaintiff's request was denied initially and upon  
16 reconsideration. Tr. 30-37. Plaintiff requested a hearing  
17 before an Administrative Law Judge (ALJ) which was held on April  
18 27, 2007. Tr. 733, 736. At that time, plaintiff amended her  
19 onset date to her date of filing. On June 21, 2007, the ALJ  
20 found plaintiff not disabled. Tr. 65. On May 21, 2009, the  
21 Appeals Council denied plaintiff's request for review. Tr. 7.  
22 Accordingly, the ALJ's decision became the agency's final  
23 decision.

#### 24 STATEMENT OF THE FACTS

25 At the time of the hearing, plaintiff was 35 years old.  
26 Tr. 738. Plaintiff has a GED. Id. Plaintiff has worked in  
27 daycare and as a companion and a community program aid. Tr. 783-  
28 84.

## STANDARD OF REVIEW

This court must affirm the Secretary's decision if it is based on proper legal standards and the findings are supported by substantial evidence in the record. Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). The court must weigh "both the evidence that supports and detracts from the Secretary's conclusion." Martinez v. Heckler, 807 F.2d 771, 772 (9th Cir. 1986).

The initial burden of proof rests upon the claimant to establish disability. Howard v. Heckler, 782 F.2d 1484, 1486 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected . . . to last for a continuous period of not less than 12 months. . . ." 42 U.S.C. § 423(d) (1) (A).

The Secretary has established a five-step sequential process for determining whether a person is disabled. Bowen v. Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1520, 416.920. First the Secretary determines whether a claimant is engaged in "substantial gainful activity." If so, the claimant is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R. §§ 404.1520(b), 416.920(b).

In step two the Secretary determines whether the claimant

1 has a "medically severe impairment or combination of  
2 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.  
3 §§ 404.1520(c), 416.920(c). If not, the claimant is not  
4 disabled.

5 In step three the Secretary determines whether the  
6 impairment meets or equals "one of a number of listed impairments  
7 that the Secretary acknowledges are so severe as to preclude  
8 substantial gainful activity." Id.; see 20 C.F.R. §§  
9 404.1520(d), 416.920(d). If so, the claimant is conclusively  
10 presumed disabled; if not, the Secretary proceeds to step four.  
11 Yuckert, 482 U.S. at 141.

12 In step four the Secretary determines whether the claimant  
13 can still perform "past relevant work." 20 C.F.R. §§  
14 404.1520(e), 416.920(e). If the claimant can work, she is not  
15 disabled. If she cannot perform past relevant work, the burden  
16 shifts to the Secretary. In step five, the Secretary must  
17 establish that the claimant can perform other work. Yuckert, 482  
18 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e)-(g), 416.920(e)-(g).  
19 If the Secretary meets this burden and proves that the claimant  
20 is able to perform other work which exists in the national  
21 economy, she is not disabled. 20 C.F.R. §§ 404.1566, 416.966.

## 22 DISCUSSION

### 23 1. The ALJ's Findings

24 At step one, the ALJ found that plaintiff had not engaged  
25 in substantial gainful activity since October 15, 2004, her  
26 alleged amended disability date. Tr. 19, Finding 1.

27 At step two, the ALJ found that plaintiff had the following  
28 severe impairments: depression with a history of psychotic

1 features (hallucinations); post-traumatic stress disorder (PTSD);  
2 borderline intellectual functioning; borderline personality  
3 disorder; history of polysubstance abuse in apparent remission;  
4 history of pulmonary embolism (March 2004) with anxiety and panic  
5 episodes following from concern of recurrence; hypothyroid,  
6 treated; obesity; and diabetes mellitus. Tr. 19, Finding. 2

7 At step three, the ALJ found that plaintiff's impairments  
8 did not meet or equal the requirements of a listed impairment.  
9 Tr. 19, Finding 3. In determining plaintiff's residual  
10 functional capacity (RFC), the ALJ found that plaintiff was  
11 unable to follow complex or detailed instructions; unable to  
12 maintain ongoing interaction with the general public beyond  
13 occasional or superficial exchanges; unable to tolerate crowded  
14 conditions; unable to consistently engage in cooperative  
15 teamwork; unable to maintain rapid production pace; and  
16 intolerant of unannounced changes in the work setting. Tr. 20.

17 At step four, the ALJ found that plaintiff was able to  
18 perform her past relevant work as a home day care provider and  
19 companion. Tr. 25-26, Finding 5. Although not required to do  
20 so, the ALJ made an alternative step five finding. The ALJ found  
21 that, based on the above residual functional capacity, plaintiff  
22 could perform work existing in significant numbers in the  
23 national economy; specifically noting the positions identified by  
24 the vocational expert (VE): light duty cashier, such as a parking  
25 lot cashier, garment sorter; and cafeteria attendant. Tr. 26-27,  
26 Finding 9.

1           2. Plaintiff's Allegations of Error

2           A. Medical Evidence of Record

3           Plaintiff alleges that the ALJ failed to properly consider  
4 and address the medical evidence of record.

5           Plaintiff argues that the ALJ improperly evaluated the  
6 consultative psychiatric opinion of Dr. Salvador in December  
7 2004. Tr. 388-95. Dr. Salvador's prognosis stated, "Appears to  
8 be guarded for this individual for having significant improvement  
9 in occupational functioning in the near future. Her prognosis  
10 for the long run may be somewhat less guarded due to the fact  
11 that she hasn't really had the benefit of much in the way of mood  
12 stabilizer trials." Tr. 393 (emphasis added). When considering  
13 the medical record in its entirety, plaintiff's impairments are  
14 not as severe as determined by Dr. Salvador. Tr. 19-26.  
15 Plaintiff reported that her pulmonary embolism caused her severe  
16 anxiety, however, her treating physicians reassured her of its  
17 probable resolution. Tr. 21, 388. Plaintiff suffered a  
18 pulmonary embolism in March 2004, although plaintiff was reported  
19 to be stable at all times. Tr. 20, 222. Plaintiff's physician  
20 started plaintiff on Coumadin and Lovenox and subsequent imaging  
21 studies in 2004 indicated the pulmonary embolism was resolved.  
22 Tr. 20, 422, 519.

23           The ALJ also noted that plaintiff complained of an  
24 inability to remember, concentrate and multi-task, however, she  
25 stated that she could do these things prior to her  
26 methamphetamine abuse in 1999. Tr. 21, 389. The ALJ noted that  
27 plaintiff failed to mention that she had recently relapsed and  
28 that in the prior six months, she had abused alcohol,

1 methamphetamines, and marijuana. Tr. 21. Further, the ALJ noted  
2 that Dr. Salvador's opinion reflected plaintiff's self-reported  
3 problems of recent pulmonary embolism, however, failed to  
4 mention her recent drug and alcohol abuse. Tr. 21, 388-95. A  
5 physician's opinion that is premised on plaintiff's subjective  
6 complaints is weighed the same as plaintiff's own testimony.  
7 Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9<sup>th</sup> Cir. 2001).  
8 Moreover, as quoted above, despite Dr. Salvador's opinion  
9 regarding plaintiff's marked limitations, he also opined that her  
10 condition could improve with medication and the record supports  
11 exactly that. Tr. 21, 22-26. The record as a whole indicates  
12 that when plaintiff ceased abusing drugs and alcohol and complied  
13 with her individual and group therapy sessions, she improved.  
14 Tr. 20-26.

15 Finally, the ALJ noted that Dr. Salvador's checklist  
16 assessment was in response to plaintiff's report to him that she  
17 was hiding in her room and having psychotic symptoms. The ALJ  
18 found that in light of plaintiff's documented improvement with  
19 actual treatment, tr. 20-25, 390, 413, 417, 422-33, 590, 597,  
20 605, 642-43, 653, 656, 663, 666; as well as resolution of the  
21 symptoms giving rise to plaintiff's perceived level of  
22 impairment, tr. 20-25, 413, 417, 422-33, 519; documentation of  
23 symptom exaggeration, tr. 24, 711; the impact of plaintiff's  
24 noncompliance and drug and alcohol abuse, tr. 20, 326-34, 437-  
25 39); and later observations of plaintiff's unimpaired  
26 functioning, tr. 20-25, 390, 413, 417, 422-33, 590, 597, 605,  
27 642-43, 653, 656, 663, 666; Dr. Salvador's checklist assessment  
28 was given little weight. Tr. 21-26. See Crane v. Shalala, 76

1 F.3d 252, 253 (9<sup>th</sup> Cir. 1996) (ALJ rejected three psychological  
2 evaluations "because they were check -off reports that did not  
3 contain any explanation for the bases of their conclusions.").  
4 The ALJ here provided sufficient reasons supporting his decision,  
5 therefore the court accepts the ALJ's analysis of Dr. Salvador's  
6 opinion.

7 The plaintiff also argues that the ALJ erred in  
8 discrediting the March 2007 disability opinion of Dr. Eckstein.  
9 Again, the ALJ met his burden by setting out a detailed and  
10 thorough summary of the facts and conflicting clinical evidence,  
11 and made findings in that regard. Tr. 19-26. The medical record  
12 as a whole supports the ALJ's finding that plaintiff's  
13 impairments were not as severe as determined by Dr. Eckstein.  
14 Tr. 19-26. Dr. Eckstein acknowledged the possibility of  
15 exaggeration in plaintiff's self reporting. Tr. 23, 711. An  
16 opinion based on uncritical acceptance of plaintiff's subjective  
17 complaints cannot be accorded significant weight under the Act  
18 and may be disregarded. Bayliss v. Commissioner, Social Security  
19 Administration, 427 F.3d 1211 (9<sup>th</sup> Cir. 2005). The ALJ also  
20 noted plaintiff's inconsistent reporting to both Drs. Eckstein  
21 and Salvador regarding her hallucinations. Tr. 23-24. The ALJ  
22 found that plaintiff's statements were not credible as her self-  
23 reports were erratic and not corroborated by the Douglas County  
24 Mental Health records. Tr. 20-21, 23-24, 431-33, 439, 488, 641-  
25 43. Moreover, plaintiff reported recovering from a relapse of  
26 addiction to prescription drugs within two weeks of her  
27 evaluation. Tr. 24, 708. Also, as noted above, plaintiff  
28 reported that her mental symptoms decreased significantly when



1 she was in counseling, which is corroborated by the record. When  
2 plaintiff participated in individual and group counseling  
3 sessions, her mental symptoms improved significantly so that she  
4 ceased attending counseling, and her status was described as  
5 "stable" and "doing well" by her therapists as well as by  
6 plaintiff herself. Tr. 24, 639-666, 705-17. Upon ceasing her  
7 counseling sessions, within one month plaintiff relapsed into  
8 drug abuse. The ALJ properly gave the chart notes of her  
9 counseling sessions over time greater weight than the one-time  
10 evaluation by Dr. Eckstein. Tr. 24. Therefore, the ALJ properly  
11 evaluated the medical evidence from Dr. Eckstein.

12 B. Plaintiff's Credibility

13 The plaintiff argues that the ALJ erred in finding her  
14 testimony and other subjective complaints not entirely credible.  
15 Tr. 25. The ALJ provided clear and convincing reasons for  
16 rejecting plaintiff's testimony that she was disabled by her  
17 impairment. In order to reject plaintiff's testimony, the ALJ  
18 must make findings "sufficiently specific to permit the reviewing  
19 court to conclude that the ALJ did not arbitrarily discredit the  
20 claimant's testimony." Orteza v. Shalala, 50 F.3d 748, 750 (9<sup>th</sup>  
21 Cir. 1995). Here, reliable evidence supports plaintiff's  
22 allegations that she experience some limitations, but does not  
23 support plaintiff's' allegations that she is incapable of  
24 working. Tr. 19-26. If a plaintiff submits medical evidence of  
25 an underlying impairment, but testifies that she experiences pain  
26 (or other symptom) at a higher level, the Commissioner may  
27 disbelieve that testimony. Nyman v. Heckler, 779 F.2d 528, 531  
28 (9<sup>th</sup> Cir. 1985). Plaintiff's credibility was undermined by the

1 lack of medical evidence to support the severity of limitations  
2 she claimed. The lack of medical evidence combined with other  
3 evidence in the record allows the ALJ to draw an adverse  
4 inference as to plaintiff's credibility. Tonapetyan, 242 F.2d at  
5 1147-48. Here, the ALJ judges plaintiff's credibility based on  
6 a consideration of the entire record and provided clear and  
7 convincing reasons supported by substantial evidence for his  
8 determination. SSR 96-7p.

9 **CONCLUSION**

10 The Commissioner's decision is based on substantial  
11 evidence, and is therefore, affirmed. This case is dismissed.  
12 IT IS SO ORDERED.

13 Dated this 19 day of September 2010.

14  
15  
16  
17 

18 Ann Aiken  
19 United States District Judge  
20  
21  
22  
23  
24  
25  
26  
27  
28